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SUPREME COURT, U. S.

No. 517

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

SAVE WAY NORTHERN BLVD. INC.,

*Appellant,*

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

*Appellee.*

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

## APPELLANT'S REPLY TO MOTION TO DISMISS

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Appellee's unseemly and unsupported attack upon appellant, charging it with attempting to "outwit and evade", with "deliberate violation", with engaging in a "scheme to circumvent", indicates a brief reply to point up the real issue presented on this appeal.

There is nothing in the record to support the charge that appellant was criminally motivated in choosing the name "Save Way" as its trade and brand name; and for all of its vituperation, appellee does not accuse appellant of failure to post proper signs on pumps (fol. 47) or of having committed any fraudulent practice in violation of §B36-104.0 of the Administrative Code.*

* Section B36-104.0 reads in pertinent part as follows:

"§B36-104.0 FRAUDULENT PRACTICES PROHIBITED.—It shall be unlawful for any person, firm or corporation to sell or offer for sale gasoline or other petroleum products for use in motor vehicles at retail in any manner so as to deceive or tend to deceive the purchaser as to the price, nature, quality or identity thereof, . . . or to substitute, mix or adulterate gasoline or other petroleum products sold or offered for sale under a name, trade name, brand, symbol or mark."

The sole question presented on this appeal is whether New York City, in the guise of regulating the business of selling gasoline, may constitutionally make it a crime punishable by fine and imprisonment for appellant to use its trade and brand name "Save Way".

The question here presented was not disposed of by this Court's dismissal of the appeal in *Serve Yourself Gasoline Stations Ass'n* v. *Brock*, 39 Cal. 2d 813, 249 P. 2d 545 (1952) app. dism. 345 U.S. 980 (1953), as suggested by Appellee (brief p. 14). The California statute does not prohibit display of the word "save" on signs of sufficient size to be visible from the road. It merely requires that the actual price of gasoline be stated in numbers of equal size—a requirement which would clearly violate the New York City Ordinance.*

The Supreme Court of California, in upholding the constitutionality of its statute, expressly pointed to the fact that no one is prevented from displaying words such as "save". Recognizing that "the right to advertise is a property right * * * ," the Court said:

> "* * * the legislation under consideration here differs substantially from that involved in the above cases (citing *People* v. *Arlen Service Stations, Inc.* among others). There the right to maintain signs of a sufficient size to be read by a passing motorist was prohibited. Our statutes do not prohibit effective advertising in this sense. Rather, sections 20882 and 20883 of the Business and Professional Code en-

* Appellee's overzealousness may be illustrated by its baseless assertion (brief, page 17) that appellant has sought to withhold from the courts below the price at which it sells its gasoline. Aside from the fact that the burden of proof was upon the prosecution which made no inquiry on the subject, the folio references cited in support of said assertion support the charge not at all (see cited Record folios 50-51, 72, 146-150).

> courage the same by establishing minimum requirements as to size of lettering on the signs, thereby making more certain that the passing motorist can read them. The difference is of significance. *The ultimate right to advertise price is unaffected by our statutes* * * *" (Emphasis supplied.)

Our brief in the Special Sessions Court is quoted at length in an effort to show that we argued below that the ordinance was intended to avoid fraud in posting prices on signs, as if appellant's argument that the ordinance was not intended to prevent the use of its trade name is inconsistent with the position taken on this appeal that the ordinance, as interpreted below, violates appellant's constitutional rights.

It may be, as we urged below, that appellant's conviction goes much too far in expanding the ordinance's applicability, but this Court takes the statute as it finds it, including its interpretation by the highest Court of the State (see, e.g., *Smith* v. *California,* 361 U.S. 147 (1959)).

So interpreted, the appellee must argue that the city's right to regulate the gasoline business justifies its proscribing the use of any words which would suggest that a particular gasoline dealer offers savings, thrift or economy in the purchase of gasoline or a better price than his competitor's.

Under the ordinance as interpreted, the words "thrift", "bargain", "discount", "savings", "economy", "sale", common words used in our competitive system are forbidden and the use of any of them in advertising on signs constitutes a crime punishable by fine and imprisonment.*

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* §B36-105.0 VIOLATIONS. Violation of any of the provisions of this article shall, upon conviction therefor, be punished by a fine of not more than two hundred fifty dollars or by imprisonment for not more than sixty days, or by both such fine and imprisonment.

Clearly, there is no relationship between so sweeping a prohibition—vitally affecting the business of appellant and other independent dealers—and the avowed purpose of the ordinance to prevent fraud in the retail sale of gasoline.

As was recently stated by Mr. Justice Douglas in his dissent in *Martin* v. *Walton*:

> "States have great leeway in making classifications, in providing general rules, in differentiating evils by broad lines or by narrow ones. Where, however, a State declares what purpose the law has, no room is left to conceive of any other purpose it may serve. See *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U.S. 522, 530. A law, fair on its face, may be applied in a way that violates the Equal Protection Clause of the Fourteenth Amendment. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-374. Here the law as applied has no relation whatsoever to the declared evil at which the law was aimed. It is, therefore, invidious in its application, striking without reason at a citizen's activities which touch several States, as constitutionally they are entitled to do under our federal regime. *Cf. Edwards* v. *California*, 314 U.S. 160" (30 U.S. Law Week 4002, 4003, decided Nov. 6, 1961).

While the City of New York concededly has the power to regulate the sale of gasoline so as to prevent fraud, there is none the less a substantial question here presented respecting the constitutional limits in the exercise of that power. This question is of public importance and deserves resolution by this Court.

Respectfully submitted,

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